

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 16 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0368-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BARRY JAYE WADE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20060854

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Barry Jaye Wade

Florence
In Propria Persona

HOWARD, Chief Judge.

¶1 Petitioner Barry Wade pled guilty to one count of sexual abuse of a minor under fifteen years of age, a dangerous crime against children, and one count of child molestation, designated a preparatory dangerous crime against children. In a previous of-right petition, he sought relief pursuant to Rule 32, Ariz. R. Crim. P., asserting that the trial court erred in not allowing him to withdraw his plea. We denied relief on the subsequent petition for review. *State v. Wade*, No. 2 CA-CR 08-0323-PR (memorandum decision filed Mar. 12, 2009). In this second petition for post-conviction relief, Wade raised claims of ineffective assistance of trial counsel and judicial misconduct. The trial court summarily dismissed his petition because it found that his claims were precluded. This petition for review followed.

¶2 Wade appears to argue his trial counsel was ineffective by misleading him about critical elements of the plea agreement, and, therefore, he did not knowingly and intelligently enter into the agreement. He further argues that the trial judge “act[ed] improperly” with respect to the plea agreement. We will not disturb a trial court’s grant or denial of post-conviction relief absent a clear abuse of the court’s discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶3 Rule 32.2(a)(3) states that a “defendant shall be precluded from relief under this rule based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.” Although Rule 32.2(b) contains limited exceptions to preclusion, Wade has not shown that any of them apply in this case. And because Wade had different counsel for his first Rule 32 proceeding than he had in trial court, he waived

the claims of ineffective assistance of trial counsel and judicial misconduct by not raising them in his first Rule 32 proceeding. *See State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (claim not raised in previous Rule 32 proceeding waived and precluded in subsequent proceeding); *cf. State v. Bennett*, 213 Ariz. 562, ¶¶ 14-15, 146 P.3d 63, 67 (2006) (ineffective assistance of appellate counsel claim precluded in successive Rule 32 proceeding unless same attorney was both appellate counsel and first Rule 32 counsel). Accordingly, the trial court did not abuse its discretion in determining the claims were precluded.

¶4 Wade nonetheless contends that his claims should not be precluded because it was not his fault that counsel did not raise them in his first Rule 32 proceeding. However, there is no such exception to the rule of preclusion. *See* Rule 32.2(b). And Wade did not properly argue here or below that his of-right Rule 32 counsel’s assistance had been ineffective.

¶5 Additionally, Wade raises a new issue in this petition for review, claiming that Judge Leonardo “acted with complicity in a possible fraud perp[e]trated [u]pon” Wade by denying his motion to withdraw the plea and by dismissing his petition for post-conviction relief. However, this court will not consider for the first time on review issues that have neither been presented to nor ruled on by the trial court. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Rule 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court . . . which the defendant wishes to present” for review).

¶6 Finding no abuse of the trial court's discretion, we grant review but deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge